83-1874

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No. 83-

In the Supreme Court of the United States

October Term, 1983

David MacDonald,

Appellant,

vs.

Louis P. Mountanos,

Appellee.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

California Code of Civil Procedure § 351 tolls the statute of limitations for those periods during which a defendant in a civil action is physically absent from the state. Therefore, a nonresident defendant may obtain the benefit of California's statute of limitations only by being physically present in the state for whatever time (here, one year) is provided by the applicable statute of limitations. The questions presented are:

1. Does California Code of Civil Procedure § 351 impermissibly infringe upon the Commerce Clause by making the statute of limitations defense available to nonresidents conducting interstate business only if they remain physically present in the state for the period of limitations? and

2. Does California Code of Civil Procedure § 351 unconstitutionally infringe upon the fundamental right to travel by requiring nonresident defendants, to obtain the benefit of the statute of limitations, to be physically present in California?

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Pursuant to Rule 15.1, appellant states that the parties not named in the caption of this action in this Court are defendants David Mitchell, Cathy Mitchell, Richard Ofshe, Arthur Disterheft and The Reader's Digest Association, Inc.

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No. 83-

In the Supreme Court of the

United States

October Term, 1983

David MacDonald,

Appellant,

vs.

Louis P. Mountanos,

Appellee.

On Appeal from the Court of Appeal
of the State of California,
First Appellate District

JURISDICTIONAL STATEMENT

David MacDonald, the appellant, appeals from the order striking his statute of limitations defense on the ground that the statute was tolled by § 351 of the California Code of Civil Procedure during appellant's

physical absence from the State. Tolling occurs despite the existence of several reasonable alternatives, including statutory provisions for service on out-of-state defendants. Application of the tolling provision directly, and impermissibly, impedes interstate commerce and penalizes exercise of the fundamental right to travel.

OPINIONS BELOW

The orders of the Superior Court of the State of California, in and for the County of Marin, dated December 8, 1983 and June 22, 1983, ruling on various statute of limitation defenses and striking appellant's statute of limitation defense (pp. 1a-9a), are unreported. The order of the Court of Appeal, State of California, First Appellate District, dated January 11, 1984, denying appellant's petition for intermediate appellate review (p. 10a), and the February 15, 1984 order of the California

Supreme Court denying hearing (p. 11a) are also unreported.

JURISDICTION

This appeal seeks review of a state statute (California Code of Civil Procedure § 351) which, by tolling the statute of limitations as to periods of a nonresident defendant's absence from the State of California, violates the Commerce Clause of the United States Constitution and impermissibly penalizes the fundamental right to travel.

The order of the California Superior Court striking appellant's statute of limitations defense in a libel action was filed on June 22, 1983 (pp. 1a-2a). The order of the California Court of Appeal, First Appellate District, denying appellant's petition for a writ of mandate was filed on January 11, 1984 (p. 10a). The order of the Supreme Court of the State of California denying appellant's petition for hearing was filed on February 15,

1984 (p. 11a). Notices of appeal were filed in the California Court of Appeal, First Appellate District, and in the California Superior Court, in and for the County of Marin, on May 2, 1984 and May 7, 1984, respectively (pp. 12a-15a).

The appeal is being docketed in this Court within ninety days of the denial of hearing by the California Supreme Court. Jurisdiction of this Court to hear the appeal rests upon 28 U.S.C. § 1257(2). Alternatively, jurisdiction rests upon 28 U.S.C. § 2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the

equal protection of the laws" (U.S.Const., Amend. 14, § 1).

Due Process Clause, United States Constitution:

"No person shall * * * be deprived of life, liberty, or property without due process of law * * *" (U.S.Const., Amend. 5).

Commerce Clause, United States Constitution:

"The Congress shall have Power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *" (U.S.Const., Art. I, § 8, cl. 3).

California Code of Civil Procedure, §§ 350, 351:

§ 350: "When an action is commenced. An action is commenced, within the meaning of this Title, when the complaint is filed."

§ 351: "Exception, where defendant is out of the State. If,

when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action."

In addition, the following sections of the California Code of Civil Procedure are involved in the case: §§ 335, 340(3), 411.10, 415.40, 416.10, 581a(a), and 581a(d). They are set forth in the appendix (pp. 16a-19a).

STATEMENT OF THE CASE

Appellant, David MacDonald, wrote an article entitled "The Little Paper That Dared" which appeared in the July 1981 Reader's Digest. The subject of the article was the award of the Pulitzer Prize to a small Marin

County weekly newspaper for its reports on the activities of a powerful and bizarre California cult, Synanon. The article referred to certain activities of the then Sheriff of Marin County, appellee, Louis P. Mountanos. Based upon the claim that the references in the article to him were defamatory, appellee filed his complaint demanding $80 million damages.

Appellant, the author of the article, is not, and never has been, a resident of the State of California. He resides in Canada and was not in California during the one-year period prior to the filing of the complaint on June 18, 1982. Process was served upon appellant pursuant to California Code of Civil Procedure § 415.40 by mailing a summons and complaint to him at his business office in Toronto, Canada.

How the Federal questions were raised:

Appellant MacDonald's answer raised the defense of California's statute of

limitations (California Code of Civil Procedure § 340(3)). Appellee moved for summary adjudication of that defense on the ground that the statute of limitations was tolled by California Code of Civil Procedure § 351 during appellant's absence from California. In a memorandum in opposition to appellee's motion, appellant argued, inter alia, that § 351 should not apply if it penalized the exercise of fundamental Constitutional rights, in particular, the rights of freedom of speech and of the press, and that appellant's ability to travel to California and write stories on California subjects would be substantially impaired if § 351 were to be applied. The Superior Court of California, in and for the County of Marin, ruled that the statute of limitation had run as to certain other defendants who were present in the State of California and as to whom § 351 of the Code of Civil Procedure did not toll the statute of limitations (pp. 3a-9a). However, the court ruled that the statute of limitations

was tolled as to appellant--and others[1]--because of absence fro . the State of California, and it granted appellee's motion to strike appellant's statute of limitations defense (pp. 1a-2a, 8a).

Appellant petitioned the Court of Appeal, State of California, First Appellate District, for a writ of mandate to direct the superior court to set aside its order striking the statute of limitations defense. Appellant argued (1) that application of § 351 was an unconstitutional infringement of interstate commerce, citing a recent decision which invoked the Commerce Clause in holding the denial of a statute of limitations defense to be unconstitutional (Coons v. American Honda Motor Co. (N.J. 1983) 463 At1.2d 921) and

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1 Defendants David and Cathy Mitchell, the owners of the Point Reyes Light are California residents who traveled outside California and were thus denied the statute of limitations defense. They have also filed an appeal in this Court.

(2) that application of § 351 constituted an unconstitutional impairment of the fundamental right to travel. The Court of Appeal denied the petition without opinion (p. 10a). Appellant then petitioned the California Supreme Court for a hearing, reiterating the same arguments presented to the Court of Appeal, and citing an intervening recent decision pertaining to violation of the Commerce Clause through denial of a statute of limitations defense (McKinley v. Combusion Engineering, Inc. (D.Idaho 1983) 575 F.Supp. 942). The petition for hearing was denied without opinion on February 15, 1984 (p. 11a), thus rejecting the precise Federal constitutional positions urged here.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

This Court's recent decision in Calder v. Jones (1984) _____ U.S. _____, 52 Law Week 4349, holds that a nonresident author of

an allegedly libelous publication is subject to jurisdiction in states in which he can anticipate that injury will occur (52 Law Week 4351). It is entirely reasonable, as this Court held in Calder, that an author be deemed present for jurisdictional purposes if his allegedly libelous article has entered the forum and caused injury there. However, the California courts have interpreted California Code of Civil Procedure § 351 to toll the statute of limitations during those periods that a nonresident defendant is not actually physically present in California. It is patently unreasonable and unfair that, at the same time a defendant is present for jurisdictional purposes, he is deemed absent for purposes of tolling the statute of limitations. Author MacDonald is in that precise situation. This state rule creates an unreasonable burden on interstate commerce and impermissibly interferes with the fundamental constitutional right to travel.

I. CALIFORNIA'S TOLLING STATUTE VIOLATES THE COMMERCE CLAUSE.

Author MacDonald and thousands of other journalists, authors and writers gather information in or write about California subjects. Not even including the thousands of international sources, there are over 47,000 media sources outside the State of California: over 39,000 publishers of newspapers, books and periodicals and nearly 8,000 radio and television stations. There can be no question these journalists, including appellant, are engaged in commerce when they prepare and transmit information about California subjects. It has long been recognized that "the transmission of information interstate is a form of 'intercourse,' which is commerce" (Fisher's Blend Station v. Tax Comm'n. (1936) 297 U.S. 650, 655). Moreover,

> "'[E]very negotiation, contract, trade, and dealing between citizens

> of different States, which contemplates and causes * * * importation [from one state to another], whether it be of goods, persons, or information, is a transaction of interstate commerce'" (International Textbook Co. v. Pigg (1910) 217 U.S. 91, 107) (emphasis in original).

In addition, it is settled that "[t]he movement of persons falls with the protection of the commerce clause" (Service Mach. & Shipbuilding Corp. v. Edwards (5 Cir. 1980) 617 F.2d 70, 73, citing Edwards v. California (1941) 314 U.S. 160, 172). Accordingly, the tolling statute must be subjected to scrutiny under the Commerce Clause.

This Court has recognized that the "'right to sue and defend in the courts * * * is one of the highest and most essential privileges of citizenship'" (International Textbook Co. v. Pigg (1910) 217 U.S. 91, 112). The California tolling statute plainly denies

nonresidents the full right to defend which is available to residents. This is a per se violation of the Commerce Clause. In Coons v. American Honda Motor Co. (N.J. 1983) 463 Atl.2d 921, a New Jersey statute required that a foreign corporation secure a doing-business certificate to avoid tolling of the statute of limitations. The court held that the statute violated the Commerce Clause because a state could not "force licensure on foreign corporations dealing exclusively in interstate commerce by otherwise preventing them from gaining the benefit of the statute of limitations defense" (463 Atl.2d 927).

An even more egregious violation of the Commerce Clause exists here. The only way appellant could have obtained the benefit of the statute of limitations would have been to remove himself to California and to be physically present thereafter for the one-year limitation period after the magazine was distributed to the public. The burden upon an

individual--required to be physically present during the entire limitation period to obtain the defense--is immeasurably greater and magnified astronomically in comparison to the burden of obtaining a doing-business certificate. This requirement of a coerced residence upon a person engaged solely in interstate commerce is exactly the type of condition which is impermissible under the Commerce Clause.

Even if it were assumed that appellant was not engaged exclusively in interstate commerce, and that a balancing--rather than per se--test applied, there would still be a violation of the Commerce Clause. This Court delineated the applicable test in Hughes v. Oklahoma (1979) 441 U.S. 322:

> "(1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;

(2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce" (441 U.S. 336).

This test was recently applied in McKinley v. Combustion Engineering, Inc. (D.Idaho 1983) 575 F.Supp. 942 in which the court held that it was an unconstitutional burden on commerce to require a foreign corporation to expose itself to personal jurisdiction in Idaho courts in order to obtain the statute of limitations defense. The court noted that the tolling statute provided a benefit to Idaho citizens in "a cost and time savings" in effecting service, but it concluded that:

> "[A] statutory scheme that in essence requires foreign corporations to waive a legal defense places a serious burden on interstate commerce.

> These statutes do provide benefits to Idaho residents, but the same benefits could be realized through less onerous means. But even if less onerous means were not available, the Court would still find * * * that the burdens placed on interstate commerce by the Idaho tolling statutes are clearly excessive when compared to the benefits obtained by those statutes" (575 F.Supp. 948).

As in McKinley, there could be no showing that the coerced physical presence for individuals required by California's tolling statute serves any permissible local interest. Reasonable alternatives to coerced presence are readily available and provide ample protection for California residents. Indeed, California has an extensive legislative scheme for preserving causes of action:

1. An action is commenced by the filing of a complaint (California Code of Civil

Procedure, §§ 350, 411.10). Commencement of an action tolls the statute of limitations from the date of filing of the complaint (Los Angeles v. Superior Court (1968) 264 Cal.App.2d 766, 767, 773, 70 Cal.Rptr. 826).

2. The complaint must be served within three years of its filing (California Code of Civil Procedure, § 581a(a)), but that period is extended for the time during which a defendant is not amenable to service (id., § 581a(d)).

3. Service may be easily effected on defendants who are outside the State of California (California Code of Civil Procedure, § 415.40 (service by mail); § 416.10 (service on corporate agent)). Indeed, appellant MacDonald was served by mail in his office in Canada.

Plainly, the tolling provision's requirement of coerced physical presence directly discriminates against interstate commerce and serves no legitimate local

purpose. It constitutes a serious--and unconstitutional--burden on interstate commerce.

II. THE CALIFORNIA TOLLING PROVISION IMPERMISSIBLY IMPAIRS THE FUNDAMENTAL RIGHT TO TRAVEL.

This Court has recognized that "'[f]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution'" (Dunn v. Blumstein (1972) 405 U.S. 330, 338; to the same effect: Memorial Hospital v. Maricopa County (1974) 415 U.S. 250, 254). "The right to travel" is a "fundamental personal right" (405 U.S. 338). Therefore, any statutory regulation which infringes upon exercise of this fundamental right to travel is unconstitutional unless "it promotes a compelling state

interest" (Shapiro v. Thompson (1969) 394 U.S. 618, 638) (emphasis in original).

There can be no question that California's tolling statutes directly impinges upon the fundamental right to travel. California residents cannot travel outside California without risking loss of the statute of limitations defense. Nonresidents such as appellant MacDonald are even more vitally affected: They must be physically present in California for the entire statutory period to obtain the benefit of the statute of limitations defense. Otherwise, an author of an article in a national magazine, book or newspaper remains potentially liable forever in California and in every state which follows the California rule. No greater infringement upon the right of travel could be imagined.

California's tolling statute cannot withstand even minimal, or "rational basis," scrutiny, much less the higher standard of serving a compelling State interest. As

discussed above (pp. 17-18), California has an extensive legislative scheme for preserving causes of action. That scheme renders the tolling of the statute of limitations wholly unnecessary. Therefore, there can be no justification whatever for the severe infringement of the right of travel imposed by the tolling statute.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal. In the alternative, review should be granted under 28 U.S.C. § 2301.

Dated: May 15, 1984.

Respectfully submitted,

WALTER R. ALLAN

Counsel of Record

WILLIAM I. EDLUND

Attorneys for Appellant

PILLSBURY, MADISON & SUTRO

DAVID OTIS FULLER, JR.

Of Counsel

APPENDIX A
MINUTE ORDER RULING ON PLAINTIFF'S
MOTION FOR SUMMARY ADJUDICATION OF
STATUTE OF LIMITATIONS DEFENSE, ET CETERA

In the Superior Court of the State of California

In and for the County of Marin

LOUIS P. MOUNTANOS,

Plaintiff,

vs.

THE READER'S DIGEST ASSOCIATION, INC., et al.,

Defendants.

No. 108199

The Plaintiff's Motion for Summary Adjudication of Statute of Limitations Defense, Raised in Answer of Defendants The Reader's Digest Association, Inc., and David MacDonald, and for Order Striking that Defense from Answer, which was filed herein on May 10, 1983, is granted as to the Defendant David MacDonald. CCP 351; Cvecich vs. Giardino, 37 Cal. App. (2nd) 394. Said motion is denied as to The Reader's Digest Association. Loope vs.

Greyhound Lines, Inc, 114 Cal. App. (2nd) 611, which was cited with approval in Dew vs. Appleberry, 23 Cal. (3rd) 630, Footnote 8. See, also, Rios vs. Torvald Klaveness, 2 Cal. App. (3rd) 1077, on Page 1080; Raynolds vs. Volkswagenwerk, et cetera, 275 Cal. App. (2nd) 997.

DATED: 6/21/83.

s/ David W. Menary, Jr.
Judge of the Superior Court

(Stamped "FILED, Jun. 22, 1983, Howard Hanson, Marin County Clerk")

APPENDIX B
MINUTE ORDER RULING ON VARIOUS
MOTIONS FOR SUMMARY JUDGMENT

In the Superior Court of the State of California

In and for the County of Marin

LOUIS P. MOUNTANOS,

Plaintiff,

vs.

THE READER'S DIGEST ASSOCIATION, INC., et al.,

Defendants.

No. 108199

Under the Single Publication Rule, publication of an integrated issue of a mass media writing occurs upon the first general distribution of the material to the public. The earliest date on which the allegedly defamatory information is substantially and effectively communicated to a meaningful mass of readers is the determinative factor. In ascertaining the date of publication, the courts have looked to the mailing date to

subscribers on the theory that the publisher is thereby divested of control, as well as the placement of a substantial body of copies of the publication for sale on the newstands. Strict vs. Superior Court, 143 Cal. App. (3rd) 916. Thus, the issue is the earliest time at which substantial distribution took place.

The complaint herein was filed June 18, 1982. However, the defendant Disterheft was out of the state 12 days in the year preceding June 18, 1982; the defendant ofshe, five days' the defendant David Mitchell approximately 70 to 71 days; and, the defendant Cathy Mitchell left the State of California on June 12, 1982 and, apparently, has not returned to date or, at least, did not return until after the complaint was filed.

CCP 351 provides that if, after a cause of action accrues, a person departs from the state, the time of his absence is not a part of the time limited for the commencement of the action.

This section does not apply to a corporation. Loope vs. Greyhound Lines, 114 Cal. App. (2nd) 611. Nor is CCP 351 unconstitutional because it suspends the running of the statue of limitations as to individuals but not as to corporations. Dew vs. Appleberry, 23 Cal. (3rd) 630. Thus, the statute of limitations was not suspended as to Readers Digest Association (RDA), but was as to the individual defendants.

With respect to Cathy Mitchell, the statute of limitations was suspended from June 12, 1982 until after the filing of the complaint, so that the complaint was timely filed as to her.

With respect to David Mitchell, the statute of limitations was suspended for at least 70 days, so that, in order for him to prevail on his statute of limitations defense, the earliest substantial distribution would have had to occur by March 31, 1981. There is no triable issue of fact that any distribution

occurred on or before that date, as the magazine was not even printed by March 31, 1981. Therefore, the plaintiff's complaint was timely filed as to the defendant David Mitchell.

There is no triable issue of fct that the first general distribution of the material to the public took place on or before June 17, 1981. As the statute of limitations was not suspended as to RDA, the filing of the complaint on June 18, 1982 was not timely as to RDA.

The statute of limitations was suspended as to the defendant Ofshe for five days, so that, in order for him to prevail on his defense of the statute of limitations, the first substantial distribution would have had to occur no later than June 12, 1981.

The uncontradicted evidence is that a substantial number of the magazines were accepted into the postal system by June 9, 1981, and that they were thereafter duly

delivered, so that some were received by subscribers as early as June 10, June 11 and June 12, 1981. As the plaintiff filed his complaint on June 18, 1982, it is time barred as against the defendant Ofhse.

With respect to the defendant Disterheft, the statute of limitations was suspended for 12 days, so that, in crder for him to prevail on his statute of limitaions defense, the earliest substantial distribution would have had to occur by June 5, 1981. The evidence reveals that on June 2, 1981, 37,694 copies of the magazine were received into the mail in Alaska and 53,253 copies were received into the mail in Hawaii (Exhibit A to Palermo Declaration). This is the earliest mailing date and is the first general distribution of the article to the public. At the time of such mailing, a cause oa action accrued in plaintiff's favor, causing the statute of limitations to commence running. As the statute of limitations was tolled as to

Disterheft for 12 days, the plaintiff had until June 14, 1982 to file his complaint against the defendant Disterheft. He did not file it until June 18, 1982 and, therefore, it is time barred as against the defendant Disterheft.

IT IS ORDERED as follows:

(1) The motion of the defendants Cathy Mitchell and David Mitchell for summary judgment is denied.

(2) The motion of Readers Digest Association for summary judgment is granted.

(3) The motion of defendant Ofshe for summary judgment is granted.

(4) The motion of defendant Disterheft for summary judgment is granted.

(5) The motion of the plaintiff Louis Mountanos for summary adjudication of the statute of limitations defense raised in the defendants' answers is granted as to the defendants Cathy Mitchell and David Mitchell, but is denied as to the defendants Readers

Digest Association, Richard Ofshe and Arthur Disterheft.

The plaintiff's request for expenses and attorney's fees is denied.

DATED: 12/6/83.

s/ David Menary, Jr.
Judge of the Superior Court

(Stamped "FILED, Dec. 8, 1983, Howard Hanson, Marin County Clerk")

APPENDIX C
(ORDER DENYING PETITION FOR
WRIT OF MANDATE)

IN THE COURT OF APPEAL OF THE STATE
OF CALIFORNIA, FIRST APPELLATE
DISTRICT, DIVISION THREE

DAVID MacDONALD,

Petitioner,

vs.

SUPERIOR COURT, COUNTY OF MARIN,

Respondent,

LOUIS P. MOUNTANOS,

Real Party in Interest.

No. A025608
Marin Superior Court No. 108199

BY THE COURT:

The petition for writ of mandate is denied. (White, P. J., Scott, J. and Barry-Deal, J. participated in the decision.)

Dated Jan 11, 1984 s/ White, P.J.

(Stamped "FILED, Jan. 11, 1984, Court of Appeal, First Dist., Clifford C. Porter, Clerk)

APPENDIX D
ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL
1st District, Division 3, No. A025608

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

MacDONALD, Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF MARIN, Respondent;
MOUNTANOS, Real Party in Interest.

BIRD, C.J., DID NOT PARTICIPATE.

Petition for hearing DENIED.

s/ Reynoso
Acting Chief Justice

(Stamped "SUPREME COURT, FILED, Feb. 15, 1984, Laurence P. Gill, Clerk")

APPENDIX E
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

In the Court of Appeal of the State of California

First Appellate District

Division Three

DAVID MacDONALD,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MARIN,

Respondent,

LOUIS P. MOUNTANOS,

Real Party in Interest.

No. A025608
(Marin County Superior Court No. 108199
Hon. David Menary, Jr., Judge)

PLEASE TAKE NOTICE THAT DAVID MacDONALD, the petitioner and a defendant in this action, hereby appeals to the Supreme Court of the United States from the minute order ruling on plaintiff's motion for summary

adjudication of statute of limitations defense, the order of the Court of Appeal denying David MacDonald's petition for writ of mandate, and the final order entered by the Supreme Court of California on February 15, 1984, denying David MacDonald's petition for hearing.

This appeal is taken pursuant to the provisions of 28 U.S.C. section 1257(2).

Dated: April 30, 1984.

PILLSBURY, MADISON & SUTRO
WILLIAM I. EDLUND
WALTER R. ALLAN

By s/ Walter R. Allan
Attorneys for Petitioner
David MacDonald

(Stamped "FILED, May 2, 1984, Court of Appeal, First Dist., Clifford C. Porter, Clerk")

APPENDIX F
NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

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David MacDonald

In the Superior Court of the State of California,
in and for the County of Marin

LOUIS P. MOUNTANOS,

Plaintiff,

vs.

THE READER'S DIGEST ASSOCIATION, INC., (a New York corporation), DAVID MacDONALD, RICHARD OFSHE and DOES 1-20,

Defendants.

No. 108199

PLEASE TAKE NOTICE THAT DAVID MacDONALD, a defendant herein, hereby appeals to the Supreme Court of the United States from

the minute order ruling on plaintiff's motion for summary adjudication of statute of limitations defense, the order of the Court of Appeal denying David MacDonald's petition for writ of mandate, and the final order entered by the Supreme Court of California on February 15, 1984, denying David MacDonald's petition for hearing.

This appeal is taken pursuant to the provisions of 28 U.S.C. section 1257(2).

Dated: April 30, 1984.

PILLSBURY, MADISON & SUTRO
WILLIAM I. EDLUND
WALTER R. ALLAN

By s/ Walter R. Allan
Attorneys for Defendant
David MacDonald

(Stamped "FILED, 5/7/84, Howard Hanson, Marin County Clerk")

APPENDIX G

Additional Statutory Provisions

California Code of Civil Procedure:

§ 335: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows":

§ 340: "Within one year: * * * (3) An action for libel, [or] slander * * *."

§ 411.10: "A civil action is commenced by filing a complaint with the court."

§ 415.40: "A summons may be served on a person outside this state in any manner provided by this article or by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed

complete on the 10th day after such mailing."

§ 416.10: "A summons may be served on a corporation by delivering a copy of the summons and of the complaint:

"(a) To the person designated as agent for service of process as provided by any provision in Section 202, 1502, 2105 or 2107 of the Corporations Code (or Sections 3301 to 3303, inclusive, or Sections 6500 to 6504, inclusive, of the Corporations Code as in effect on December 31, 1976 with respect to corporations to which they remain applicable);

"(b) To the president or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a

person authorized by the corporation to receive service of process."

§ 581a: "(a) No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the action shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of the action, except where the parties have filed a stipulation in writing that the time may be extended or the party against whom the action is prosecuted has

made a general appearance in the action.

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"(d) The time during which the defendant was not amenable to the process of the court shall not be included in computing the time period specified in this section."

END OF DOCKET